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(USA) LLC, and Credit Suisse Loan Funding LLC

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA**

In re  
LAKE AT LAS VEGAS JOINT VENTURE,  
LLC, ET AL.,  
Debtors.

Jointly Administered Under  
Case No. BK-S-08-17814-LBR

Adversary No. 10-01284-LBR

LARRY LATTIG, in his capacity as trustee of  
the LLV CREDITOR TRUST created in  
accordance with the THIRD AMENDED  
CHAPTER 11 PLAN OF  
REORGANIZATION PROPOSED BY LAKE  
AT LAS VEGAS JOINT VENTURE, LLC  
AND LLV-1, LLC,

Plaintiff,

v.

820 MANAGEMENT TRUST, et al.,

Defendants.

AND RELATED THIRD PARTY CLAIMS<sup>1</sup>

**REPLY MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT OF  
MOTION OF CREDIT SUISSE AG,  
CAYMAN ISLANDS BRANCH,  
FORMERLY KNOWN AS CREDIT  
SUISSE, CAYMAN ISLANDS BRANCH  
(AS SUCCESSOR TO CREDIT SUISSE  
FIRST BOSTON, CAYMAN ISLANDS  
BRANCH), CREDIT SUISSE  
SECURITIES (USA), AND CREDIT  
SUISSE LOAN FUNDING LLC TO  
DISMISS THIRD PARTY COMPLAINTS  
OF BASS THIRD PARTY PLAINTIFFS  
AND BOEDDEKER THIRD PARTY  
PLAINTIFFS**

Date of Hearing: June 17, 2011  
Time of Hearing: 9:30 a.m.

<sup>1</sup> "Bass Third Party Plaintiffs" refers to Third Party Plaintiffs 820 Management Trust, Lee M. Bass, Sid R. Bass, and Sid R. Bass Management Trust. "Boeddeker Third Party Plaintiffs" refers to Catherine M. Boeddeker and David J. Voorhies, in their capacity as Co-Trustees of the Ronald F. and Catherine M. Boeddeker Management Trust, Transcontinental Corporation, and William P. Hallman, Jr. A list of the Debtors is set forth on the docket in Case No. BK-S-08-17814-LBR at ECF No. 1. A list of the Defendants, Third Party Plaintiffs and Third Party Defendants is set forth in the caption of the pleading in Adversary No. 10-01284-LBR at ECF Nos. 136, 138.

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1 Third Party Defendants Credit Suisse AG, Cayman Islands Branch, formerly known as  
 2 Credit Suisse, Cayman Islands Branch (as successor to Credit Suisse First Boston, Cayman  
 3 Islands Branch), Credit Suisse Securities (USA) LLC, and Credit Suisse Loan Funding LLC  
 4 respectfully submit this Reply Memorandum of Points and Authorities in support of their Motion  
 5 to Dismiss (“Motion”) the Third Party Complaints of: (1) 820 Management Trust, Lee M. Bas,  
 6 Sid R. Bass, and Sid R. Bass Management Trust (collectively, “Bass Third Party Plaintiffs”); and  
 7 (2) Catherine M. Boeddeker and David J. Voorhies, in their capacity as Co-Trustees of the  
 8 Ronald F. and Catherine M. Boeddeker Management Trust, Transcontinental Corporation, and  
 9 William P. Hallman, Jr. (collectively, “Boeddeker Third Party Plaintiffs”) (Bass Third Party  
 10 Plaintiffs and Boeddeker Third Party Plaintiffs collectively, “Third Party Plaintiffs”).

# I.

## INTRODUCTION

14 The Motion explained that the claims asserted in the Third Party Complaint should be  
 15 dismissed for each of the following independent reasons: (a) the preclusive effect of the Plan  
 16 and Confirmation Order bars a claim for any relief that has the effect of preventing or avoiding  
 17 the distribution of the Net Litigation Proceeds as specified in the Plan; (b) Third Party Plaintiffs  
 18 lack standing because they have alleged no facts showing that the distribution of the Net  
 19 Litigation Proceeds will affect the amount that Third Party Plaintiffs may be required to pay the  
 20 Creditor Trustee; (c) the claims rest on the incorrect premise that the Creditor Trustee seeks to  
 21 hold Third Party Plaintiffs “liable” for “Obligations” as defined in the 2004 Credit Agreement  
 22 and 2007 Amended Credit Agreement; and (d) Third Party Plaintiffs have alleged no facts  
 23 showing the confidential relationship required for the imposition of a constructive trust.

24 Third Party Plaintiffs’ Oppositions ignore the third of these independently dispositive  
 25 reasons -- that there is no basis to prevent or avoid any distribution of the Net Litigation  
 26 Proceeds because the Creditor Trustee’s action does not seek to impose “liab[ility]” on Third  
 27 Party Plaintiffs for any “Obligations.” On this basis alone, the claims should be dismissed.

Moreover, as explained below, the Opposition fails to rebut any of the other three independent reasons that the claims must be dismissed. The Motion therefore should be granted.

## II.

### ARGUMENT

#### A. The Preclusive Effect Of The Plan And Confirmation Order Bars The Relief Sought By Third Party Plaintiffs

Third Party Plaintiffs argue that the preclusive effect of the Plan and Confirmation Order does not bar their claims because: (1) the Confirmation Order's provisions releasing or exculpating Third Party Defendants from liability for specified post-Petition acts and omissions do not apply to (a) "distributions from the Creditor Trust," or (b) pre-Petition Date acts or omissions; (2) the Plan does not explicitly provide that Third Party Defendants "get to keep" their portion of the Net Litigation Proceeds after it has been distributed; and (3) the Bass Third Party Plaintiffs did not receive "formal notice of the Plan." (Boeddeker Third Party Plaintiffs' Opposition to Creditor Trustee's Motion to Dismiss and/or Strike ("Boeddeker Opp. to Motion to Strike"), at 9, 11; Bass Third Party Plaintiffs' Consolidated Opposition to Motions to Dismiss ("Bass Opp."), at 7, 12.) None of these reasons has merit.

#### 1. The Confirmation Order's Release And Exculpation Provisions Are Irrelevant

Third Party Plaintiffs' arguments regarding the scope of the Confirmation Order's release and exculpation provisions are *non sequiturs*. Third Party Defendants have not taken the position that the Plan or Confirmation Order releases or exculpates them from all conceivable claims or liabilities relating to "distributions from the Creditor Trust" or pre-Petition Date acts or omissions. Rather, Third Party Defendants' point is that the preclusive effect of the Plan and the Confirmation Order bars claims, such as those asserted in the Third Party Complaint, that specifically seek to prevent or avoid the distribution of the Net Litigation Proceeds as required

1 by the Plan's provisions regarding the Classification and Treatment of the Gross Pre-Petition  
2 Lender Claims.

3 Moreover, nothing in Paragraph 33 of the Confirmation Order "preserves" claims that are  
4 barred by the preclusive effect of the Plan and Confirmation Order. Paragraph 33 provides,  
5 among other things, that: (a) the Lender Exculpated Parties are exculpated from specified  
6 liabilities for post-Petition Date acts or omissions "related to, or arising out of" specified events,  
7 "excluding distributions from the Creditor Trust;" and (b) "[t]he foregoing exculpations shall not  
8 . . . affect, alter, bar, or preclude any claims or defenses arising from pre-petition conduct, events  
9 or occurrences that any defendant in any post-Confirmation Date litigation may be able to assert  
10 against the foregoing exculpated parties . . . ." (Dkt. No. 2502, at 15 ¶ 33.) These provisions do  
11 nothing more than limit the scope of Paragraph 33's exculpation from specified liabilities for  
12 specified post-Petition Date acts or omissions. They do not purport to "preserve" or authorize  
13 any relief, including relief based on alleged pre-Petition Date conduct, that is barred by the  
14 preclusive effect of the Plan or Confirmation Order.

15  
16 **2. The Plan And Confirmation Order Preclude Any Attempt To Prevent  
Or Avoid Distribution Of The Net Litigation Proceeds**

17 As explained in the Motion, the preclusive effect of the Plan and Confirmation Order bars  
18 a claim for any relief, including damages or other monetary relief against a non-debtor, that  
19 would effectively "redivide the pie" or "upset the confirmed plan." In re California Litfunding,  
20 360 B.R. 310, 320 (Bkrtcy. C.D. Cal. 2007). Preventing or avoiding the distribution of the Net  
21 Litigation Proceeds as required by the Plan's provisions regarding the Classification and  
22 Treatment of the Gross Pre-Petition Lender Claims would have the practical effect of  
23 "redivid[ing] the pie" and "upset[ting] the plan." (*Id.*) Thus, regardless of whether the Plan or  
24 Confirmation Order specifically provides that Third Party Defendants "get to keep" their portion  
25 of the Net Litigation Proceeds after it has been distributed, any attempt to prevent or avoid such  
26 distribution is precluded.  
27  
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1                   **3.     The Claimed Lack Of Formal Notice To The Bass Third Party**  
 2                   **Plaintiffs Is Irrelevant**

3                   Nowhere in their lengthy Opposition papers do the Bass Third Party Plaintiffs deny that  
 4 (a) they had actual notice of the bankruptcy proceeding and the submission of the Plan for  
 5 confirmation, and (b) as ordered by this Court, the Debtors provided publication notice of the  
 6 hearing on and deadline to file objections to the Plan. (Motion, at 2 n. 1.) Instead, the Bass  
 7 Third Party Plaintiffs argue that they are allowed to attack the Plan's provisions regarding the  
 8 Classification and Treatment of the Gross Pre-Petition Lender Claims because they were not  
 9 given "formal notice" of the Plan through service of Plan-related documents. (Bass Opp., at 9.)

10                  But, as the cases cited by the Bass Third Party Plaintiffs confirm, such "formal notice" is  
 11 required only for *known creditors*. See, e.g., In re Maya Constr. Co., 78 F.3d 1395, 1399 (9<sup>th</sup>  
 12 Cir. 1996) (known creditor "whose entitlement to money from the debtor will be destroyed by  
 13 the judgment is entitled to notice") (cited in Opp. at 8). For unknown creditors or non-creditors,  
 14 notice by publication is sufficient. See, e.g., Paging Network, Inc. v. Nationwide Paging, Inc. (In  
 15 re Arch Wireless, Inc.), 534 F.3d 76, 80 (1<sup>st</sup> Cir. 2008) ("bankruptcy law distinguishes between  
 16 'known creditors,' who are entitled to receive direct notice of each stage in the reorganization  
 17 proceedings, and 'unknown creditors,' for whom publication notice is sufficient") (citing New  
 18 York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 296 (1953), and additional  
 19 cases). Third Party Plaintiffs are not and never have claimed to be known creditors, or creditors  
 20 at all. Their undisputed actual notice and the publication notice given by the Debtors therefore is  
 21 more than sufficient to satisfy due process and the Bankruptcy Code, and thus to subject the Bass  
 22 Third Party Plaintiffs to the preclusive effect of the Plan and Confirmation Order.

23                   **B.     Third Party Plaintiffs Lack Standing**  
 24

25                  Third Party Plaintiffs argue that they have pleaded the injury in fact that is necessary for  
 26 Article III standing because, if they "are found liable in the underlying adversary action but are  
 27 successful in the action against the Pre-Petition Lenders, the Pre-Petition Lenders will receive  
 28 nothing, and the Former Investors will retain that portion of any award that otherwise would

1 have gone to them.” (Boeddeker Third Party Plaintiffs’ Consolidated Opposition to Motions to  
 2 Dismiss (“Boeddeker Opp. to Motions to Dismiss”), at 7; Bass Opp., at 12.) But the Third Party  
 3 Complaint alleges no facts suggesting that the distribution of the Net Litigation Proceeds as  
 4 required by the Plan will have any effect on the amount Third Party Plaintiffs will have to pay  
 5 the Creditor Trustee if he prevails on any of his claims. Rather, Third Party Plaintiffs will have  
 6 to pay the same amount to the Creditor Trust regardless of how that amount thereafter may be  
 7 distributed. Third Party Plaintiffs thus have not pleaded any cognizable injury that is traceable to  
 8 any such distribution, and therefore lack standing under Article III to bring an action that seeks  
 9 to prevent or avoid such distribution.

10  
 11 **C. There Is No Basis To Impose A Constructive Trust**

12 Third Party Plaintiffs argue that the confidential relationship that is necessary for a  
 13 constructive trust exists because, “[i]n its various roles, Credit Suisse essentially controlled the  
 14 appraisal process, determined the loan amount, and worked on behalf of the Third-Party  
 15 Plaintiffs to value the Lake at Las Vegas project and solicit interest in the loan offering among  
 16 Pre-Petition Lenders.” (Boeddeker Opp. to Motions to Dismiss, at 12; Bass Opp., at 12.) But  
 17 the Paragraphs of the Third Party Complaint that they cite (¶¶ 6-9, 12, 21) do not contain any  
 18 such allegations. Moreover, even if such allegations were made and proven, they would not  
 19 establish “[t]he essence of a . . . confidential relationship” – that “the parties d[id] not deal on  
 20 equal terms.” Giles v. GMAC, 494 F.3d 865, 881 (9th Cir. 2007) (quoting Hoopess v.  
 21 Hammargren, 725 P.2d 238, 242 (Nev. 1986)). Because Third Party Plaintiffs have not pleaded  
 22 the necessary facts, it is appropriate to dismiss the constructive trust claim at the pleading stage.  
 23 See, e.g., Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP, 440 F. Supp. 2d 1184,  
 24 1197 (D. Nev. 2006) (dismissing constructive trust claim).



III.

**CONCLUSION**

For the reasons explained above, the Motion should be granted and all claims asserted in the Third Party Complaints of the Bass Third Party Plaintiffs and the Boeddeker Third Party Plaintiffs against Third Party Defendants Credit Suisse AG, Cayman Islands Branch, formerly known as Credit Suisse, Cayman Islands Branch (as successor to Credit Suisse First Boston, Cayman Islands Branch), Credit Suisse Securities (USA) LLC, and Credit Suisse Loan Funding LLC should be dismissed with prejudice.

Dated: May 27, 2011

Respectfully Submitted,

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